UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 4	)	
and	)	**Case No. 19-CC-092816**
	)	**19-CC-115273**
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 48, AFL-CIO	)	**19-CD-092820**
	)	**19-CD-115274**

PMA'S STATEMENT OF POSITION

Pacific Maritime Association ("PMA") respectfully submits this Statement of Position pursuant to the National Labor Relations Board's ("NLRB's" or the "Board's") March 2, 2021 invitation.

I. INTRODUCTION

The Board's January 31, 2019 Decision and Order ("Decision") in this case arose from charges that were filed on November 8, 2012. On February 1, 2019, the International Longshore and Warehouse Union and International Longshore and Warehouse Union, Local 4 (collectively, the "ILWU") petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's Decision in *International Longshore and Warehouse Union and International Longshore and Warehouse Union, Local 4*, 367 NLRB No. 64 (January 31, 2019). On June 13, 2019, PMA filed its own petition for review, which the Ninth Circuit consolidated with the ILWU's case.

On October 14, 2020, the Ninth Circuit granted the ILWU's and PMA's petitions and vacated the Board's Decision. The court held that the underlying Section 10(k) decision did not

preclude the ILWU from reasserting its work preservation defense in the subsequent unfair labor practice charge proceeding under Section 8(b)(4)(D). *See Int'l Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 636 (9th Cir. 2020). The court further held that the Board applied an "impermissibly narrow construction of the work preservation doctrine" and misconstrued the terms of the Pacific Coast Longshore Contract Document ("PCLCD"), a multi-employer collective bargaining agreement negotiated by PMA on behalf of its member companies. *Id*. at 642. Furthermore, the court held the underlying Section 10(k) decision did not preclude the Board from reconsidering the ILWU's argument that Kinder Morgan Bulk Terminals ("Kinder Morgan") and the International Brotherhood of Teamsters Local 48 ("IBEW") concocted a superficial jurisdictional dispute in order to invite Board intervention. *Id.* at 631 n.6 & 636 n.12.

On remand, the Board must reconsider the ILWU's work preservation defense in accordance with the Ninth Circuit's decision. This requires the Board to determine whether the ILWU's post-Section 10(k) conduct had a lawful work preservation objective. The Administrative Law Judge ("ALJ") previously made this determination in a manner consistent with the Ninth Circuit's decision, concluding that the ILWU's work preservation defense "warrants dismissal of this complaint in its entirety." 367 NLRB No. 64, slip op. at 19. Therefore, on remand, the Board can either affirm the ALJ's decision or make a new determination based on the existing record or, if additional evidence is needed, after a further hearing before an ALJ.

In addition, the Board should reconsider the ILWU's argument that Kinder Morgan and the IBEW colluded to set up the Section 10(k) case. So far, neither the ALJ nor the Board have considered the ILWU's evidence on this issue, which the Ninth Circuit remanded to the Board "for consideration under the appropriate legal standard." 978 F.3d at 636 n.12.

II. ARGUMENT

A. The Board Must Reconsider Whether The ILWU's Post-Section 10(k) Conduct Had A Legitimate Work Preservation Objective.

In its decision—which now serves as the law of the case—the Ninth Circuit made clear that a work preservation defense can be re-litigated in a Section 8(b)(4)(D) case. *Id.* at 636 (holding "the Board erred in finding its 10(k) determination dispositive of the Longshoremen's work preservation defense"). The Ninth Circuit's decision is consistent with the Board's prior precedent, which holds that, at the Section 8(b)(4)(D) stage, a party's "work preservation defense is a mixed question of fact and law relating to the alleged illegal object of the Respondent's conduct." *ILWU Local 6 (Golden Grain)*, 289 NLRB 1, 2 (1988).[1]

In this case, the ALJ already made that determination, finding that the ILWU's activities were "in furtherance of a primary work-preservation object" even though that determination was "at odds with the conclusion reached by the Board in the 10(k) proceeding." 367 NLRB No. 64, slip op. at 16. The ALJ properly concluded that "it is the work performed by the ILWU mechanics in the multiemployer, coastwise unit that counts" in assessing the work preservation defense. *Id.* The ALJ found that the Complaint should be dismissed based on the ILWU's work preservation defense. *Id.* at 19.

On remand, the Board may simply affirm the ALJ's decision because the ALJ already made the determination that would normally need to be made, as a mixed question of law and fact, in a Section 8(b)(4)(D) case. In making that determination, the ALJ assessed the ILWU's work preservation defense in a manner consistent with the Ninth Circuit's decision.

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[1] Under Board precedent, a union could not avoid a Section 8(b)(4)(D) violation simply by meeting the "fairly claimable" and "right of control" prongs of a valid work preservation defense. The ultimate issue in a Section 8(b)(4)(D) case is whether the union's conduct actually had a lawful work preservation objective, instead of an illegal object of forcing an employer to reassign work that the Board properly assigned to other employees in a Section 10(k) award. *See id.*

Alternatively, the Board may make a new determination based either on the existing record or after giving the parties an opportunity to supplement the record with additional evidence. This could include additional evidence that Kinder Morgan had the right to control the assignment of the work in dispute and, in fact, voluntarily assigned it to an ILWU mechanic after the Section 10(k) award.

B. The Board Should Consider The Evidence That The IBEW Threat That Created The Section 10(k) Dispute Was The Product Of Collusion.

The Board should also consider the evidence that the IBEW and Kinder Morgan colluded to create the Section 10(k) dispute. In its January 31, 2019 Decision, the Board refused to allow the ILWU to introduce new evidence of collusion—specifically emails between counsel for Kinder Morgan and the IBEW. *See Int'l Longshore and Warehouse Union, Local 4*, 367 NLRB No. 64, slip op. at 4 n.6. The Ninth Circuit held, however, that the Board's refusal to consider this evidence was erroneous and, therefore, remanded the collusion issue "for consideration under the appropriate legal standard." 978 F.3d at 636 n.12.

The Board's existing standard requires "affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *Laborers Int'l Union of N. Am. (Eshbach Brothers, LP)*, 344 NLRB 201, 202 (2005) (citation omitted). Because affirmative evidence of collusion exists here, the Board should consider that evidence on remand. The Board and the parties should not continue to expend resources litigating a case that was the product of collusion.

Dated: March 30, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of PMA's Statement of Position was filed with the Office of the Executive Secretary today, March 30, 2021, using the NLRB's e-Filing system and was served by email upon the following:

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